

STATE OF NORTH CAROLINA

**FILED**

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
06 DOA 0112

COUNTY OF WAKE

Corporate Express Office Products, Inc. )  
Petitioner )

vs.

OFFICE OF  
ADMINISTRATIVE  
HEARINGS

**FINAL AGENCY DECISION**

N. C. Division of Purchase and Contract )  
Respondent )

and )

Office Depot, Inc. )  
Respondent-Intervenor )

Having reviewed the official record in this contested case, and having considered the exceptions and written arguments of counsel for the parties herein, I hereby issue the Department of Administration's Final Decision in this contested case, pursuant to N.C. Gen. Stat. § 150B-36.

#### STATEMENT OF THE CASE

This matter involves the award of Term Contract 615A by the N. C. Division of Purchase and Contract (hereinafter "P&C") to Office Depot, Inc. (hereinafter "Office Depot"). Term Contract 615A (hereinafter the "Contract") is a requirements contract for all state purchasing of general office supplies, toner, inkjet and fax cartridges, office equipment and limited quantities of printer/copier paper. Other tax supported agencies including public schools and universities have the option of purchasing office supplies under the discounted prices offered by Contract.

P&C determined that Office Depot was the successful bidder based on a combination of a price and service offered to the State and awarded the contract to Office Depot on November 10, 2005. The potential savings under the Contract were more than \$4,500,000.00, as compared to prior contract for office supplies.

Corporate Express Office Products, Inc. (hereinafter also "Petitioner") was an unsuccessful offeror for the Contract. On January 20, 2006, Petitioner filed a petition with the Office of Administrative Hearings contesting the award of the Contract to Office Depot, Inc.

The petition was heard before Beecher R. Gray, Administrative Law Judge, in Raleigh, North Carolina on April 25, April 26, April 27, and April 28, 2006. On May 17, 2006, the Administrative Law Judge issued a recommended decision that the Department of Administration should not have awarded Term Contract 615A to Office Depot, Inc. as a sole source vendor.

On June 30, 2006, the Department of Administration notified the parties of their right to file both written exceptions to the recommended decision and written arguments supporting their

respective positions.

**APPEARANCES**

Petitioner:	Hampton Dellinger Christopher T. Graebe Eileen R. Youens Womble Carlyle Sandridge & Rice, PLLC Post Office Box 831 Raleigh, NC 27602
Respondent:	Donald R. Teeter, Sr. Special Deputy Attorney General Susan R. Lundberg Assistant Attorney General Ann Stone Assistant Attorney General 9001 Mail Service Center Raleigh, NC 27699-9001
Respondent-Intervenor:	Hayden J. Silver, III Alan D. McInnes Kilpatrick Stockton, LLP Suite 400 3737 Glenwood Avenue Raleigh, NC 27612

**ISSUES**

Whether P&C substantially prejudiced Petitioner's rights and:

1. Exceeded its authority or jurisdiction,
2. Acted erroneously;
3. Failed to use proper procedure; or
4. Acted arbitrarily or capriciously, and/or failed to act as required by law or rule.

**APPLICABLE STATUTES AND RULES**

N.C. Gen. Stat. § 143-49  
N.C. Gen. Stat. § 143-52  
N.C. Gen. Stat. § 143-53  
N.C. Gen. Stat. § 143-129  
N.C. Gen. Stat. § 150B-23  
N.C. Gen. Stat. § 150B-34  
N.C. Gen. Stat. § 150B-36



### **EXHIBITS**

For Petitioner: 2, 4, 7, 8, 9, 11, 12, 15, 16, 19, 20, 21, 25, 26, 27, 29, 30, 31, 32, 33, 38, 39, 41, 44, 47, 49, 50, 58, 59, 60, 61, 62, 64, 65, 67, 71, 75, 78, 82, 105, 123, 148, 154, 155, 160, 161, 168, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179.

For Respondent: 1, 2, 3, 4, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27.

For Respondent-Intervenor: 1 through 10.

After examination of the official record of this contested case, including the recommended decision, and after considering the exceptions to the recommended decision and written arguments of the parties, I adopt certain Findings of Fact that were included in the recommended decision (hereinafter identified as "Adopted") and provide Additional Findings of Fact that were not contained in the recommended decision (hereinafter identified as "Additional") along with references to the official record relied upon in making the additional findings as set forth below:

### **GENERAL FINDINGS OF FACT**

- 1) The Contract at issue in this matter is a contract for the furnishing of general office supplies, toner, inkjet and fax cartridges, office equipment and limited quantities of printer/copier paper (order sizes less than two hundred dollars (\$200.00)). (Additional, Petitioner's Exhibit (hereinafter "Pet. Ex.") 19, p. 3)
- 2) Certain non-state entities, including, but not limited to, counties, public school units, cities, and towns, may, but are not required to, participate in purchasing office supplies under the Contract. (Additional, Pet. Ex 19, p. 6)
- 3) On September 1, 2005, P&C issued a Request for Proposals for the Contract (hereinafter "RFP"). (Additional, Pet. Ex. 19, p.1)
- 4) On November 10, 2005, P&C issued written notice of its decision to award the contract to [Office Depot] as the "best analyzed value, but not lowest price." (Adopted, 68)
- 5) The Contract has many advantages to North Carolina including:
  - a) The Contract is estimated to generate \$4.5 million (19%) in annual identified savings against \$23.2 million baseline spending;
  - b) The Contract lowered unit prices for over 90% of the historic office supply items purchased by the State;
  - c) The Contract contains over 19,000 items; and
  - d) The Contract eliminated the time and effort users had previously spent searching multiple vendors' online catalogs for the best price offered for the same item. (Additional, Respondent-Intervenor Exhibit (hereinafter "Int. Ex.") 7, p. 4)
- 6) After the award to Office Depot, and pursuant to 1 N.C.A.C. § 5B.1519, Petitioner timely



- submitted a protest letter to the State Purchasing Officer on December 9, 2005. (Adopted, ¶ 77)
- 7) Petitioner is a multi-national company owned by Burhmann, a company located in the Netherlands. (Additional, Transcript (hereinafter "T.") p. 188:2)
  - 8) P&C held its bid protest meeting with Petitioner on January 6, 2006. (Adopted, ¶ 78)
  - 9) Mike Mangum (hereinafter "Mangum") is State Purchasing Officer and the highest official in P&C. Mangum has 28 years experience in public procurement and has been recognized nationally for his abilities as a purchasing officer. (Additional, T. p. 758:13-763:22)
  - 10) In a letter dated January 17, 2006, State Purchasing Officer Mangum denied petitioner's bid protest, constituting notice of P&C's decision under N.C.G.S. § 150B-23(f). (Adopted, ¶ 79)
  - 11) Petitioner filed this contested case on January 20, 2006.
  - 12) The parties received notice of hearing by certified mail more than 15 days prior to the hearing. (Adopted, ¶ 1)
  - 13) Before the award of the Contract to Office Depot, P&C had administered several prior iterations of the contract for office supplies (hereinafter the "prior contract"). (Additional, T. 197:8)
  - 14) Petitioner was a vendor on [the prior contract] for several years leading up to the November 10, 2005 award. (Adopted, ¶ 3)
  - 15) In 2002, P&C issued an Invitation for Bids ("IFB") on the prior contract. (Adopted, ¶ 4)
  - 16) Petitioner was one of four vendors awarded a portion of the prior contract. However, Petitioner only provided 2,000 items on the prior contract. (Additional, T. p. 197:8)
  - 17) The four vendors on the prior contract were Petitioner, Staples, Inc., Piedmont Office Supply, and Getitquick.com. (Additional, T. p. 197:8)
  - 18) The 2002 IFB document stated that the record of each vendor's performance on the contract "will be considered in the evaluation of future bids." (Adopted, 6)
  - 19) Karen Woodall (hereinafter "Woodall") is a State Procurement Administrator III with P&C. Woodall has participated in scores of public procurement contracts. (Additional, T. p. 682:14-23)
  - 20) Mervyn Gould (hereinafter "Gould") was employed as the Chief Standards Engineer with P&C at the time of the bid. Woodall possessed 16 years of experience in the public procurement of contracts. (Additional, T. p. 1086:1-22)
  - 21) As early as January 2004, Woodall and Gould began conducting research with respect to the RFP that would then lead to the Contract. (Additional, T. p. 1058:24-1059:6)
  - 22) During their research, Woodall and Gould analyzed almost every state's bidding procedure



- and contracts in order to prepare the RFP. (Additional, T. p. 1059:16-1060:5)
- 23) Woodall and Gould selected a Pennsylvania RFP as a model because it scored non-price factors and included a reverse auction. (Additional, T. p. 1062:11-19; 1063: 5-9, 448:7-17)
  - 24) Other states which had used reverse auctions for office supply contracts had realized significant savings. (Additional, Pet. Ex. 7, p. 22, T. p. 542:18-22)
  - 25) At an early stage in the design of a new RFP for the Contract, Woodall and Gould decided they wanted to score non-price factors. The first draft of the RFP was prepared by P&C. (Additional, T. p. 546:7-11; 619:16-19; 623:8-9; 669:18-20; 1063:5-9)
  - 26) During the design of the RFP, P&C also considered soliciting bids by lots, but ultimately decided not to do so. (Additional, T. p. 1068:16-19; 999:2-11)
  - 27) In deciding whether to use lots to award the Contract, P&C evaluated both the advantages and disadvantages of such a decision. (Additional, T. p. 953:8-12, Int. Ex. 1)
  - 28) P&C found that the more vendors on a particular contract, the more difficult it was to audit the vendors to ensure compliance with pricing. (Additional, T. p. 1090:2)
  - 29) For the prior contract, P&C had been forced to hire additional employees just to audit the vendors in order to keep the vendors compliant with their pricing. (Additional, T. p. 1093:9-11)
  - 30) A general industry rule is that the internal cost to manage a contract, per supplier, is at least \$16,000 a year. This amount does not include the additional cost to users who must sort through the offerings of each individual vendor on the contract in order to determine the lowest price for each item purchased. (Additional, T. p. 499:22 – 500:17)
  - 31) It is often more cost-effective to manage one vendor under a single award contract. Users find it easier to navigate or use the e-procurement system if there is only one vendor, and user confusion concerning from which vendor to purchase a particular item is eliminated. (Additional, T. p. 471:20-472:3; 491:5-492:12; 493:7-20; 1069:10-1070:14; 1073:16-20; 925:10-18; 928:19-929:3; 953:8-12; 1088:20-1089:21)
  - 32) For the reasons set out above, P&C intended to award the Contract to a single vendor. (Additional, T. p. 495:6-24; 672:13-22; 1069:10-1070:14; 953:8-12)
  - 33) Under the prior contract, P&C had no means to offer a discount on the purchases of office supplies at retail stores. In addition, under the prior contract, P&C had no mechanism or means to track and collect data regarding the purchase of office supplies at retail stores. (Additional, T. p. 684:1-15; 699:18-20)
  - 34) Both in 2005 and for many years prior, users had purchased office supplies at retail stores. Users wanted to be able to make purchases at retail stores. (Additional, T. p. 689:9-23)
  - 35) Based on its experience administering the prior contract, P&C expected that users would continue to purchase offices supplies at retail stores. (Additional, T. p. 689:14-23; 1065:8-14;



967:8-968:8; 1005:5-11)

- 36) The decision to include guidelines relating to retail stores was based on P&C's experience and input from users of the prior contract. (Additional, T. p. 683:5-13; 1067:9-11; 837:18-838:3)
- 37) P&C decided to include retail stores as a factor in scoring responses to the RFP, but it was not a minimum qualification for vendors. (Additional, T. p. 1000:16-22; Pet. Ex. 11, p. 8, Q. 39)
- 38) In 2003, Accenture LLP ("Accenture") began working with P&C to develop a pilot reverse auction project. (Adopted, ¶ 11)
- 39) The State of North Carolina originally retained Accenture in 2000 to assist with developing the e-procurement system. In April 2003, the State amended Accenture's contract to request that Accenture assist the State with reverse auctions. At that time, the State had not identified which contract would be bid by reverse auction. (Additional, T. p. 538:16-540:11)
- 40) P&C had no prior experience in conducting reverse auctions. P&C decided that it was necessary to seek the experience and expertise offered by Accenture. (Additional, T. p. 882:1-11)
- 41) As of June 2005, P&C selected the RFP for a reverse auction. P&C paid Accenture on an hourly basis for their work on this project. Accenture was hired to assist with the design and development of the RFP for the Contract. (Additional, T. p. 460:6-12)
- 42) James Bard (hereinafter "Bard") is a consultant for Accenture. He has eight years of experience with Accenture and three years devoted solely to public contracts like the Contract. He was the Project Manager assisting P&C with the RFP. (Additional, T. 370:2-20)
- 43) Bard had prior experience with reverse auctions for office supply contracts in the state of Florida. (Additional, T. p. 403:10-404:4)
- 44) Damian Kelly (hereinafter "Kelly") is an employee of Accenture. He served in an advisory capacity to Bard. (Additional, T. p. 554:7)
- 45) Buffie Rodri (hereinafter "Rodri") is a Senior Executive with Accenture. She has worked on the e-procurement project for the State of North Carolina since 2001. (Additional, T. 519:15; 530:18)
- 46) Caprecia Poole (hereinafter "Poole") is an employee of Accenture. She served as a Data Analyst for Bard assisting P&C with the RFP. (Additional, T. 526:17)
- 47) In June or July 2005, P&C sent out surveys to the users of [the prior contract]. No more than four of the more than 80 responders made any mention of retail stores. Five of the responders mentioned next-day delivery. (Adopted, ¶ 13)



- 48) The user survey indicated that twenty-four percent (24%) of users found it difficult to use the prior contract because of multiple vendors. (Additional, Pet. Ex. 21, p. 12)
- 49) In the user survey, ninety-six percent (96%) of users indicated they were satisfied with three-day delivery. (Additional, Pet. Ex. 26, p. 12)
- 50) Nonetheless, in its discretion and for the benefit of the State, P&C issued an RFP that required better than three-day delivery. (Additional, Pet. Ex. 11, p. 2, C. 9)
- 51) On July 20, 2005, P&C and Accenture held a meeting with representative users of [the prior contract]. (Adopted, ¶ 14)
- 52) The minutes from the July 20, 2005 meeting list next-day delivery and the flexibility of desktop delivery or “central” delivery as suggestions for user requirements. Retail stores were not listed as user requirements and are not mentioned in the minutes at all. (Adopted, ¶ 15)
- 53) Even though retail stores were not mentioned in the minutes, users did discuss their desire for retail stores at the July 2005 user workshop. (Additional, T. p. 683:1066-1067)
- 54) Moreover, in addition to the feedback from users, P&C also relies on its own knowledge and expertise to determine the best value for the State and the terms for each purchasing contract. (Additional, T. p. 683:9-13)
- 55) On the following day, July 21, 2005, a meeting of the “Reverse Auction Project Team” was held. A PowerPoint presentation for that meeting summarizes the findings from the representative user group meeting and summarizes the findings from the user survey conducted by P&C and Accenture. There is no mention of retail stores in this 20-page presentation, although both next-day delivery and the option for desktop or dock delivery are referred to as “key business requirements” identified by the representative user group. (Adopted, ¶ 16)
- 56) Similarly, drafts of the RFP from August 11, 2005, August 15, 2005, and August 22, 2005 had no questions relating to retail stores and did not assign points to the technical questions. (Adopted, ¶ 22)
- 57) The “Reverse Auction Project Team,” also identified as the “core team,” consisted of Gould, Woodall, Bard and Poole. (Additional, T. p. 463:6-9)
- 58) On August 24, 2005, in an email to Gould and Woodall, Bard stated that not scoring the technical submittals “may lead to a sub-optimal outcome for the State.” (Adopted, ¶ 23)
- 59) The above-cited Finding of Fact does not include the remaining portion of Bard’s email wherein he continued, “Without evaluating and scoring the offeror’s technical proposals, P&C could potentially end up awarding the contract to the lowest price offeror that only provides the minimum level of service. This outcome could result in tremendous user dissatisfaction even though they are getting “the lowest price.” This category is not a commodity, and the users have clearly told us through their survey responses and workshop participation that service is an important factor . . . ” (Additional, Pet. Ex. 174)



- 60) On August 25, 2005, internal Accenture emails indicate that Accenture was trying to convince P&C to score the technical submittal. In one email, Buffie Rodri, Accenture's Project Leader on the reverse auction pilot program, stated that "we'll try to help [P&C] make the right decisions tomorrow." (Adopted, ¶ 24)
- 61) The above-cited Finding of Fact does not include the remaining portion of Bard's email wherein Rodri concluded, "after we see what they have to say." (Additional, Pet. Ex. 174)
- 62) On August 26, 2005, P&C met with Bard and Poole. P&C had already decided to score the technical submittals without further input from Accenture. (Additional, T. p. 546:7-16)
- 63) On August 29, 2005, in an internal Accenture email to Bard, Damian Kelly ("Kelly"), also from Accenture, asked to meet with Bard "on the questions you [Bard] are reworking with Karen and Mervyn" because "I [Kelly] would really like to see these and get an understanding of the impact scores will have against the final cost proposal (e.g. can truly bad scores make the difference in someone bidding \$2m less than a vendor with better answers)." (Adopted, 25)
- 64) The above-cited Finding of Fact does not include the remaining portion of Kelly's email wherein he continued, "I really want to be comfortable that we have made them as objective as possible and they have reasonable impacts on the final award." (Additional, Pet. Ex. 82)
- 65) On that same day, however, Bard sent an email to Bernard Donachie from Accenture stating:

P&C Management initially removed all scoring and wanted to have just Yes / No questions during Phase 1 qualify[ing] offerors for [the] Phase 2 reverse auction. We successfully got P&C to change their mind [sic] and now we will be using an Evaluation Committee to score technical proposals submitted during Phase 1.

(Adopted, ¶ 26)

- 66) The above-cited Finding of Fact does not include the beginning or ending of Bard's email which began by stating, "The team [Woodall, Gould, Bard and Poole] had proposed to use an Evaluation Committee to score Qualified offerors' responses to 30 open ended questions that addressed user requirements around services, technical, infrastructure, etc. In addition, the team wanted to include a step where the Evaluation Committee could negotiate final points with top scoring offerors prior to making final award decision," and the email concluded by stating, "However, there will be no negotiations during Phase 2. The offerors final score from Phase 1 will be combined with their pricing score from the Phase 2 reverse auction. The team will assign points per question and create a scoring guide for use by Evaluation Committee to try to make the process less subjective." (Additional, Pet. Ex. 174)
- 67) Throughout the RFP process, P&C carefully considered the consequences of awarding points for answers to questions regarding retail stores. In an email sent from Bard to Kelly at 3:07 p.m. on August 30, 2005, Bard stated that:
- The team adopted the suggested adjustments to the evaluation questions / point allocation. We also reviewed two scenarios with Mervyn [Gould] and Karen [Woodall] to demonstrate the value of points:



No NC Retail Stores Offeror - this type of offeror will not have [the] opportunity for 20 points across two questions. This translates into these offerors having to have approximately \$500K better pricing offer [sic] than offerors with NC retail stores to remain competitive.

Small business Offeror - this type of offeror will not have [the] opportunity for 20 points across two questions. This translates into these offerors having to have approximately \$500K better pricing offer [sic] than larger offerors with NC retail stores to remain competitive.

I believe they [Gould and Woodall] understood this and were comfortable.

(Additional, Pet. Ex. 123)

- 68) At the time the RFP was issued, P&C's employees [Tina]McLamb [P&C's E-Procurement Project Director], Woodall, and Gould were all aware of the effect that the point split would have on small companies, and Woodall and Gould also were aware of how the point split would affect offerors with no North Carolina retail stores. Woodall acknowledged in her testimony that a small business offeror with no retail stores would have started off 40 points behind a large company offeror with retail stores. (Adopted, ¶ 34)
- 69) At 4:16 p.m. on August 30, 2005, an hour after sending his email to Kelly, Bard sent an email to Woodall and Gould with a new draft of the technical submittal portion of the RFP containing retail store questions and references to scoring. Also attached to the email was a "scoring guide" listing specific scoring criteria for each question in the technical portion of the RFP. Bard referenced the guide in his cover email in this way: "I took a pass at adding the scoring guide for each question . . ." (Adopted, ¶ 28)
- 70) The above-cited Finding of Fact does not include the remainder of Bard's email which continued, "but we definitely need to review this as a group (including Evaluation Committee members?)." (Additional, Pet. Ex. 29)
- 71) On August 31, 2005, one day before the RFP was issued, Bard emailed Poole and Gould, with a copy to Woodall, Tina McLamb, P&C's E-Procurement Project Director, and others, with a "sensitivity analysis" showing how different point splits would affect small companies. In this email, Bard stated:

At the current 25%-75% split between Technical / Price Submittals, a small company that receives the maximum available Technical Submittal points available to a small company (250 max points - 20 points for two questions that they will likely not earn any points = 230 scored points) will have to have a Price Submittal that is around \$496K less than a large sized company that gets the maximum Technical Submittal points . . .

This 25%-75% split was the split that was used in awarding Term Contract 615A. Using the figures discussed in Bard's email, a calculation of points per question demonstrates that each point in the Technical Submittal portion of the RFP was equal to \$24,800, and two points were equal to \$49,600.



(Adopted, ¶ 29)

- 72) Bard did suggest using a total of 1,000 points to score the proposals the 25%-75% point split. This was based on Bard's past experience with point systems and P&C's desire to balance lower prices with better services. (Additional, T. p.1101-1103.)
- 73) The RFP was conducted in two phases. During Phase I, each offeror was required to submit a Technical Submittal to P&C. This non-price portion was worth 250 points out of a total 1000 points. Phase II, worth 750 points, was an online reverse auction, in which the offerors competed against each other to submit the lowest-priced bid. (Adopted, ¶ 32)
- 74) The RFP instructed offerors to prepare their proposals "simply and economically, providing a straightforward, concise description of the Offeror's ability to meet the requirements of the RFP." (Adopted, ¶ 38)
- 75) The answers to questions in Phase I were evaluated by the Evaluation Committee. The Evaluation Committee was comprised solely of P&C employees. The total possible points for Phase I was 250 points. (Additional, Pet. Ex. 19, p. 15)
- 76) Based on input from Woodall and Gould, Accenture prepared the first draft of a scoring guide. (Additional, T. p. 664:14-19)
- 77) Bard presented the scoring guide to the Evaluation Committee. Accenture's role at all meetings of the Evaluation Committee was simply to write down the comments and conclusions of the Evaluation Committee. (Additional, T. p. 411, l. 6-18)
- 78) This scoring guide provided that offerors with no retail stores received zero points on two 10-point questions. (Adopted, ¶ 54)
- 79) Offerors received a score for Phase II, based on a formula that awarded a maximum of 750 points to the vendor that submitted the lowest single bid. (Additional, Pet. Ex. 19, p. 15)
- 80) Offerors were permitted to submit questions about the RFP by September 13, 2005. Prospective offerors submitted numerous questions to P&C. (Adopted, ¶ 40)
- 81) On September 23, 2005, P&C issued an addendum to the RFP that contained P&C's answers to the questions submitted by offerors. Accenture prepared the first draft of P&C's written answers to these questions. (Adopted, ¶ 41)
- 82) While Accenture may have written the first draft of the written answers, the information for the answers was based on input from P&C. (Additional, T. p. 887:2-19)
- 83) Offerors asked numerous specific questions regarding multiple awards. In each case, P&C referred the offeror to the RFP's provision that P&C reserved the right to make a multiple award if a multiple award was in the best interests of the State. (Adopted, ¶ 43)
- 84) While the offerors were preparing their proposals, the "core team" (Gould and Woodall from P&C, and Bard and Poole from Accenture), provided the scoring guide that Bard first sent to Gould and Woodall on August 30, 2005 to the Evaluation Committee. The Evaluation



Committee was made up of five members -- including Gould and Woodall -- and one alternate, all employees of P&C. This group was given the task of scoring the Technical Submittals. (Adopted, ¶ 44)

- 85) P&C was integrally involved in drafting and reviewing each version of the scoring guide. It was P&C that approved the scoring guide before it was presented to the Evaluation Committee. (Additional, T. p. 664:16-19; 373:8-374:12)
- 86) The RFP was issued on September 1, 2005. (Adopted, ¶ 31)
- 87) Eleven offerors submitted Phase I proposals in response to the RFP on September 28, 2005. (Adopted, ¶ 46)
- 88) Two of these offerors, Staples, Inc. and Office Depot, were clients of Accenture at the time. Staples, Inc. was featured in Accenture's 2005 Annual Report, and Office Depot paid Accenture over \$30 million between February 2003 and December 2005. (Adopted, ¶ 47)
- 89) Left off the list of offerors listed in the Finding of Fact above was Corporate Express. (Additional, T. p. 961:18 -p. 965:15; 547:1)
- 90) Corporate Express had also established a business alliance with Accenture. (Additional, T. p. 961:18 -p. 965:15; 547:1; Respondent's Exhibit (hereinafter "Resp. Ex.") 26 and 27)
- 91) Furthermore, Corporate Express was in a strategic partnership with Accenture through a sub-contractor, webMethods. (Additional, T. p. 961:18 -p. 965:15; 547:1; Resp. Ex. 27)
- 92) Corporate Express' relationship with Accenture began at least as early as 2001. (Additional, T. p. 961:18 -p. 965:15; 547:1; Resp. Ex. 26 and 27)
- 93) The Evaluation Committee finished scoring the Technical Submittals before the online reverse auction, Phase II of the RFP, was held. Staples, Inc. and Office Depot -- both Accenture clients -- finished first and second, respectively, in the scoring of the Technical Submittals. (Adopted, ¶ 57)
- 94) Corporate Express finished fifth out of eleven in the scoring of the Technical Submittals (Additional, Resp. Ex. 16, 26, 27)
- 95) The Evaluation Committee, made up solely of P&C employees, scored all of the non-price factors in Phase I. (Additional, T. p. 388:5-8; 603:10-15; 605:17-24)
- 96) Accenture was not involved in any way in scoring the responses submitted by the vendors. (Additional, T. p. 582:13-21; 1105:3-13)
- 97) Office Depot received 21 points more than Petitioner on the Technical Submittal. The value of these 21 points was \$520,800.00. However, P&C chose not to reveal this fact, or any of the Technical Submittal scores, until after the reverse auction. (Adopted, 58)
- 98) Of the eleven bidders participating in the reverse auction, Petitioner submitted the lowest price bid, \$18,220,000.00, winning the reverse auction. Petitioner submitted its Price Submittal of \$18,220,000.00, to P&C within 24 hours of the reverse auction. (Adopted, ¶ 61)



- 99) Petitioner's Revised Total Price Submittal (after post-bid adjustments made by P&C) came to \$18,200,178.43. As the lowest-price bidder, Petitioner received the maximum 750 points for Phase II (Adopted, ¶ 62)
- 100) Office Depot submitted the next lowest price bid at the reverse auction, \$18,261,576.79. (Adopted, ¶ 63)
- 101) The RFP required each bidder in the reverse auction to bid a single unitary price to supply all of the requirements. Because the three categories of goods (Core Items, Generic Items, and Remaining Items) were priced using different formulae, P&C used an Offline Pricing Tool to confirm a vendor's single reverse auction bid price. This Offline Pricing Tool itemized the single price into the three categories. (Additional, Pet. Ex. 19)
- 102) According to the terms of the RFP, the total bid contained in the "Price Submittal" was required to match exactly the offeror's reverse auction bid. (Adopted, ¶ 60)
- 103) Petitioner acknowledged that submission of the online pricing tool was just a formality. (Additional, Yates, 359:14-24)
- 104) Office Depot's Price Submittal total, \$18,259,082.33, did not match its reverse auction bid, but Office Depot's Price Submittal was not rejected by P&C. Office Depot's Revised Total Price Submittal (again, after post-bid adjustments made by P&C) came to \$18,237,203.94, and Office Depot received 748 points for Phase II. (Adopted, ¶ 64)
- 105) Due to an error P&C made in the Price Submittal pricing tool form, Office Depot's reverse auction bid did not match its Price Submittal Total. Office Depot alerted P&C of this error when it submitted its Price Submittal form. Office Depot properly completed the Price Submittal form honoring all of its discounts and item prices. (Additional, T. p. 1048:6 – p. 1054:9)
- 106) Petitioner's price submittal was just \$37,000 lower than Office Depot's revised total price submittal. (Additional, Pet. Ex. 71)
- 107) While the confirming data submitted in support of each participant in the reverse auction revealed differences in category pricing, the RFP commanded a single, unitary price for all categories of items included in the RFP. (Additional, Pet. Ex. 19.)
- 108) The other offerors' Revised Total Price Submittals ranged from \$19,484,272.91 to \$29,496,721.53, receiving points ranging from 697 to 284. (Adopted, ¶ 66)
- 109) After the scoring of Phase I and Phase II, Office Depot received a total of 962 points. Corporate Express received a total of 943 points. Accordingly, P&C awarded the Contract to Office Depot. (Additional, Resp. Ex. 22)
- 110) [Petitioner] was the lowest price bidder during the process that led to the November 10, 2005 award of the [Contract] to Office Depot, Inc. (Adopted, ¶ 2)
- 111) Office Depot received the most points overall from a combination of its Technical Submittal score and its Price Submittal score. (Adopted, ¶ 67)



- 112) Under the scoring system used by P&C during Phase I one of the bidding process, only 20 out of 1,000 points could be earned by a potential offeror with respect to retail stores. Because of the presence of retail stores in the State of North Carolina, Office Depot was awarded 18 points out of 1,000 points. This comprises only 1.8 percent of the total points available under the points system used by P&C. (Additional, T. p. 941:3-18, Pet. Ex. 19)
- 113) Petitioner is ready, willing, and able to sell office supplies to the State under Term Contract 615A at the prices set forth in its submittal in response to the RFP. (Adopted, ¶ 81)
- 114) Section 3 of the RFP, entitled "Contractual Requirements" requires the delivery of office supplies ordered through the E-Procurement system. (Additional, Pet. Ex. 19, p. 8, § 3)
- 115) Section 3 of the RFP incorporates the detailed requirements of the "E-Procurement system" found in paragraphs 19 and 20 of the General Contract Terms and Conditions, Attachment F. (Additional, Pet. Ex. 19, p. 8, § 3)
- 116) A subsection of Section 3 of the RFP, entitled "ORDERING," reads in part, "there are several ordering mechanisms in place across the state and the contractor shall be capable of transacting business in a variety of ways including but not limited to: manual and electronic purchase orders, paper based transactions, telephone and fax orders." (Additional, Pet. Ex. 19, p. 8, § 3)
- 117) Orders completed by paper, telephone and faxes from outside agencies are not ordered through the E-Procurement system. (Additional, T. p. 930:18-24 – p. 931:1-3)
- 118) No mechanism is in place for payment of the 1.75% E-Procurement fee for all purchases made at retail stores. (Adopted, ¶ 18)
- 119) Accenture only receives a 1.75% E-Procurement fee for purchases made online. Accenture does not receive a fee for purchases made at retail stores. (Additional, T. p. 469:13-24 – p. 470:1-4)
- 120) In its responses to questions submitted by potential offerors, P&C stated that "the presence of retail stores is a desired feature." Nonetheless, P&C did not make the presence of retail stores a minimum requirement of the RFP. (Additional, Pet. Ex. 11, p. 8, Q. 39, T. p. 1000:17-19; 1000:2-6)

***PETITIONER'S ALLEGATIONS THAT THE CONDUCT OF P&C AND/OR ACCENTURE WAS IMPROPER OR LED TO AN APPEARANCE OF IMPROPRIETY***

- 121) There is no evidence of any wrongdoing or impropriety on the part of any employee or representative of Office Depot, Inc. with respect to the RFP or the award of Contract 615A. (Adopted, ¶ 48)
- 122) Although Accenture personnel had the capability to determine whether offerors were clients of Accenture, the Accenture personnel working on the RFP did not do so until after the contract was awarded. (Adopted, ¶ 49)



- 123) P&C did not ask Accenture whether any offerors also were current clients of Accenture. (Adopted, ¶ 51)
- 124) At some point while consulting P&C or shortly before, Bard generally became aware through an internal Accenture email that Staples, Inc. was a client of Accenture. He was not informed of any of the details regarding the nature of the work Accenture was performing for Staples. (Additional, T. p. 452:24 - p. 453:23)
- 125) Bard took no action to influence the award of the Contract to Staples or any other bidder. (Additional, T. p. 497:21-498:7)
- 126) There is no evidence that Accenture participated in or influenced the scoring conducted by members of the Evaluation Committee. (Additional, T. p. 695:1-14; 587-588; 604:1-5; 605:6-17; 1105:3-13)
- 127) Throughout the RFP process, P&C requested that Accenture memorialize and document discussions between P&C and Accenture regarding the RFP, make initial drafts of certain documents, and review and comment on those documents generated during the course of designing and implementing the RFP. (Additional, T. p. 429:2-7 )
- 128) No Accenture employee who worked on the Contract had ever been involved in any work relating to Office Depot, Staples, or any other offeror. None of these Accenture employees even knew that Office Depot was a client of Accenture until after the Contract was awarded. (Additional, T. p. 496:24-497:2; 532:7-20)
- 129) There is no evidence that Accenture's work for P&C was influenced or tainted by Accenture's work for other offerors. (Additional, T. p. 548:11-22)
- 130) Throughout the preparation of the RFP, the bidding, and the evaluation of the bids, Accenture was acting only as a consultant and advisor to P&C. (Additional, T. p. 887:11-24; 885:1-17; 948:6-15)
- 131) Petitioner presented no evidence that Accenture made any decision with respect to the award of the Contract, engaged in any evaluation of any of the offerors, or controlled any substantive decisions with respect to the design or implementation of the Contract. (Additional, T. p. 1028:3-12; 533:13-16; 460:1-3)
- 132) At all times, P&C retained and exercised the authority to make all decisions regarding the RFP, the evaluation of any bids, and the award of the Contract. (Additional, T. p. 429:9-13; 1105:3-13; 695:1-14; 1028:3-12)
- 133) At no time did Accenture undertake to influence the decisions of the Evaluation Committee in awarding the Contract. (Additional, T. p. 1105:3-13; 695:5-14)
- 134) P&C reviewed all documents drafted by Accenture before those documents were used or finalized. (Additional, T. p. 427:21-429:13)
- 135) There is no evidence in the record that Accenture or any of its employees exercised any improper influence with respect to the evaluation of bids or awards for the Contract.



(Additional, T. p. 497:21-24; 498:1-12; 575:18-576; 530:2-8; 531:5-13; 601:19-602:1; 687:14-24)

- 136) The Contract offers a benefit to the State in that all users who use a State purchase card at Office Depot retail locations now receive the discount pricing available under the Contract. In addition, Office Depot is required to make detailed reports to P&C regarding the quantity, pricing, number, and types of items, and users who make retail store purchases. This information will be of value to P&C as it decides how best to administer the next contract for office supplies. (Additional, T. p. 689:1-13)
- 137) No data was gathered nor analysis done of the costs or risks associated with state employees traveling to and from retail stores to procure office supplies covered by Term Contract 615A. (Adopted, ¶ 17)
- 138) It is uncontraverted that the decision by P&C to include retail stores as a factor to be scored by the Evaluation Committee actually ran counter to Accenture's business interests as the e-procurement consultant for the State of North Carolina. Specifically, Accenture earns a fee of 1.75 percent for every e-procurement purchased. Retail store purchases made by State users under the Contract do not generate any e-procurement income for Accenture. (Additional, T. p. 469:3-470:4; 536:1-538:3; 733:8-16)
- 139) Accenture provided valuable expertise and experience in the design and implementation of the RFP for the Contract that P&C did not possess. (Additional, T. p. 882:1-11; 887:11-24)
- 140) It is uncontraverted that P&C made the final decision to use a reverse auction and to score non-price items. (Additional, T. p. 431:7- p. 432:2; 459:24 – p. 460:19)

***PETITIONER'S ALLEGATIONS THAT P&C ACTED IMPROPERLY FOR CHOOSING TO SCORE THE VENDOR'S ANSWERS TO TECHNICAL QUESTIONS AND FOR CHOOSING NOT TO PROVIDE THESE SCORES TO THE VENDOR'S PRIOR TO THE REVERSE AUCTION***

- 141) Although offerors asked P&C specific questions about the scoring method, including but not limited to whether a vendor with more retail locations would be scored higher, P&C answered that it would "not provide point allocations for questions asked within the RFP" and did "not provide point allocations at the question level for the RFP." P&C did not state whether or how the questions would be individually scored, including not stating that offerors with no retail stores could not receive 20 of the 250 available points. (Adopted, ¶ 42)
- 142) While the RFP did not provide point allocations for each specific question, it did categorize the questions into groups and inform each vendor of the total number of points assigned to each of the four groups of questions. (Additional, T. 697:18-21, Pet. Ex. 19, p. 15)
- 143) P&C decided to not disclose the number of points that would be allocated to each specific question in order to limit the ability of the vendors to engage in "gaming" their scores.



- 144) As explained by the witnesses, if offerors know that certain factors receive more emphasis than others, there is a greater likelihood that offerors would “pad” or put more emphasis on certain questions with higher points. This would allow them to manipulate their responses regarding non-price factors in ways that would inflate their scores. (Additional, T. p 678:16-24, p. 1030:1-12)
- 145) In order to ensure that a particular offeror’s proposed pricing would not influence their scoring of the questions, P&C decided that it would complete the scoring of non-price factors before any bid prices were submitted. (Additional, T. p. 442:18-24; 443:12-16)
- 146) P&C decided to score non-price factors by assigning various points to particular factors to increase the objectivity of the evaluation process and limit the amount of subjectivity involved. The scoring of non-price factors increased the ability of the Evaluation Committee to differentiate between vendors. (Additional, T. p. 663:21-24, T. p. 373:16-19; 381:8-11; 387:2-10; 481:4-16, T. p. 572:18-24; 573:10-13, T. p. 663:9-12, T. p. 1102:14-1103:11)

***PETITIONER’S ALLEGATIONS THAT P&C ACTED IMPROPERLY IN DECIDING NOT TO AWARD POINTS FOR DELIVERY IN EXCESS OF THE MINIMUM REQUIREMENTS***

- 147) In its proposal, Petitioner promised next-day desktop delivery on over 90% of orders while further offering same-day desktop delivery for items determined critical by the State. (Adopted, ¶ 52)
- 148) According to the scoring guide, no points were awarded for next-day delivery, and no points were awarded for same-day delivery, both of which surpassed the requirements for the contract. (Adopted, ¶ 55)
- 149) Since the RFP, per the Addendum, required two-day delivery, Petitioner’s abilities were in excess of the minimum qualifications. (Additional, Resp. Ex. 2; Pet. Ex. 11 and 19, T. p. 653:7-15; p. 707:15-24; p. 1030:21 - p. 1031:9)
- 150) P&C, in its discretion, decided not to award points for delivery that was in excess of the minimum qualifications. (Additional, T. p. 707:15-708:4)

***PETITIONER’S ALLEGATIONS THAT THE P&C ACTED IMPROPERLY WHEN IT DECIDED NOT TO AWARD THE CONTRACT TO MULTIPLE VENDORS***

- 151) To award the Contract as Petitioner would propose, would be to award the Contract in lots. (Additional, T. p. 656:12-13; 658:8-14; 672:13-22)
- 152) If P&C had considered awarding the Contract in lots, the RFP would have been drafted in a manner to make clear that the Contract was to be awarded in lots. (Additional, T. p. 656:12-13; 658:8-14; 672:13-22, T. p. 495:6-23, T. p. 955:10-19; 956:9-10)
- 153) In fact, the RFP would have been broken down into eight categories of items to ensure that the State received discounts on all items. (Additional, T. p. 658:12-14)
- 154) The RFP clearly indicates that the Contract was not to be awarded in lots. The language



that indicates that the Contract was to be awarded to a single vendor in a single lot, but is not limited to the following:

- a) "Offerors shall enter one price in the reverse auction application that is the sum total of the three components." (Additional, Pet. Ex. 19, p.5)
  - b) "The total Price Submittal that Offerors shall submit during Phase II shall be composed of three components: Core Items Pricing, Generic Items Pricing and Remaining Items Pricing as specified in Attachment B – Offline Offeror's Pricing Tool." (Additional, Pet. Ex. 19, p. 13)
  - c) The Offeror with the lowest, validated Price Submittal shall receive the maximum 750 points." (Additional, Pet. Ex. 19, p. 15)
  - d) "Price Submittals shall be for all required components, including all subcategories of Core Items, all Generic Items, and all subcategories of Remaining Items. Price Submittals that do not contain all components shall not be accepted." (Additional, Pet. Ex. 19, Attachment D, p. 19)
  - e) "The prices the Offeror enters into the online reverse auction application shall be 100% of the volume contained in each component of the Offline Offeror's Pricing Tool." (Additional, Pet. Ex. 20, Attachment D, p. 20)
- 155) All of the language of the RFP indicates that the ranking with respect to the reverse auction is based on a single price bid. (Additional, Pet. Ex. 19, p. 5)
- 156) The RFP would have been designed very differently if it had been intended that offerors submit separate bids based by lots or categories of items. (Additional, T. p. 656:12-13; 658:8-14; 672:13-22; 495:6-23; 954:3-955:19; 956:9-10)
- 157) The RFP specifically stated that the pricing tool used by offerors and submitted to P&C would be used to "validate consistency and completeness" of the bids. There is no evidence that the pricing tool was designed or intended to be used to make a separate award to separate vendors based on lots or categories of bids. (Additional, T. p. 998:1-999:11; 673:4-5; 673:11-19; 1068:16-19; 1045:1-4; Pet. Ex. 19, p. 5)
- 158) The RFP did not inform the offerors that the pricing tool might be used to make separate awards by lots. (Additional, T. p. 954:3-955:19; 956:9-10)
- 159) There was no intent expressed in the RFP, nor did P&C officials have any intent to award contracts on individual lot or sub-category bases, and any attempt to have awarded on such basis would have been palpably unfair to the bidders and not have resulted in any enforceable contracts. (Additional, Pet. Ex. 19.)
- 160) Petitioner knew P&C intended to award Contract 615A to a single offeror. (Additional, T. p. 343:16-24)
- 161) Merely because P&C reserved the right to award Contract 615A to multiple vendors did not mean that P&C was required to make such an award. (Additional, T.



p. 344:1-4)

***PETITIONER'S ALLEGATIONS THAT P&C COULD HAVE SAVED COSTS IF IT HAD  
AWARDED A PORTION OF THE CONTRACT TO PETITIONER***

- 162) The reverse auction bids, and the Offline Pricing Tool that confirmed them, were based on projected quantities. (Additional, Pet. Ex. 19.)
- 163) There is no way to use either the reverse auction bids or the Offline Pricing Tool to prove what the State would actually spend during the life of this requirements contract. (Additional, Pet. Ex. 19; T. p. 924:9-14))
- 164) Petitioner's price submittal was just \$37,000 lower than Office Depot's revised total price submittal. (Additional, Pet. Ex. 71)
- 165) The State would have realized savings based on Petitioner's submittal only if the State's actual consumption exactly matched the projected quantities in the Offline Pricing Tool. (Additional, T. p. 295:1 – p. 300:17)
- 166) Thus, if Petitioner had been awarded the contract exclusively and if the State's actual consumption exactly matched the projected quantities in the Offline Pricing Tool, the State could have saved at most \$37,000.
- 167) Petitioner's claimed savings does not account for the additional costs inherent in managing more than one vendor. (Additional, T. p. 491:19-493:16)
- 168) Petitioner's claim does not account for the additional costs incurred by users who must navigate from vendor to vendor looking for the cheapest price for the same item. (Additional, T. p. 471:20-472:3; 491:5-492:12; 493:7-20; 1069:10-1070:14; 1073:16-20; 925:10-18; 928:19-929:3; 953:8-12; 1088:20-1089:21)

The above-cited Findings of Fact compel the following:

**REJECTED FINDINGS OF FACT**

After examination of the official record of this contested case, including the recommended decision, and after considering the exceptions to the recommended decision and written arguments of the parties, I reject certain Findings of Fact that were included in the recommended decision as set forth below:

1. I reject Finding of Fact 5 because it is not supported by the substantial evidence of record, is erroneous, and is contrary to the preponderance of the evidence offered in the contested case. (T. p. 197:8)
2. I reject Finding of Fact 7 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that



there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).

3. I reject Finding of Fact 8 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
4. I reject Finding of Fact 9 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
5. I reject Finding of Fact 10 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
6. I reject Finding of Fact 12 because it is not supported by the substantial evidence of record, is erroneous, and is contrary to the preponderance of the evidence offered in the contested case. (T. p. 460:6-12)
7. I reject Finding of Fact 19 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).



8. I reject Finding of Fact 20 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
9. I reject Finding of Fact 21 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
10. I reject Finding of Fact 27 because it is not supported by the substantial evidence of record, is erroneous, and is contrary to the preponderance of the evidence offered in the contested case. (Pet. Ex. 174)
11. I reject Finding of Fact 30 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
12. I reject Finding of Fact 33 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
13. I reject Finding of Fact 35 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478



- (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
14. I reject Finding of Fact 36 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
  15. I reject Finding of Fact 37 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
  16. I reject Finding of Fact 39 because it is not supported by the substantial evidence of record, is erroneous, and is contrary to the preponderance of the evidence offered in the contested case. (T. p 678:16-24, p. 1030:1-12)
  17. I reject Finding of Fact 42 because it is not supported by the substantial evidence of record, is erroneous, and is contrary to the preponderance of the evidence offered in the contested case. (Pet. Ex. 11 T. 697:18-21, Pet. Ex. 19, p. 15)
  18. I reject Finding of Fact 45 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
  19. I reject Finding of Fact 50 because it is not supported by the substantial evidence of record, is erroneous, and is contrary to the preponderance of the evidence offered in the contested case. (T. p. 452:24 - p. 453:23)
  20. I reject Finding of Fact 53 because it is not supported by the substantial evidence of record, is



erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).

21. I reject Finding of Fact 56 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
22. I reject Finding of Fact 59 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and is contradictory to the plain language of the Contract. (Pet. Ex. 19)
23. I reject Finding of Fact 65 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and is contradictory to the plain language of the Contract. (Pet. Ex. 19)
24. I reject Finding of Fact 69 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
25. I reject Finding of Fact 70 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
26. I reject Finding of Fact 71 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and



is contradictory to the plain language of the Contract. (Pet. Ex. 19, T. p. 295:1–p. 300:17; 471:20-472:3; 491:5-493:16; 493:7-20; 925:10-18; 928:19-929:3; 953:8-12;1069:10-1070:14; 1073:16-20; 1088:20-1089:21)

27. I reject Finding of Fact 72 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case and is contradictory to the plain language of the Contract. (Pet. Ex. 19, T. p. 295:1–p. 300:17; 471:20-472:3; 491:5-493:16; 493:7-20; 925:10-18; 928:19-929:3; 953:8-12;1069:10-1070:14; 1073:16-20; 1088:20-1089:21)
28. I reject Finding of Fact 73 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and is contradictory to the plain language of the Contract. (Pet. Ex. 19, T. p. 295:1–p. 300:17; 471:20-472:3; 491:5-493:16; 493:7-20; 925:10-18; 928:19-929:3; 953:8-12;1069:10-1070:14; 1073:16-20; 1088:20-1089:21)
29. I reject Finding of Fact 74 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and is contradictory to the plain language of the Contract. (Pet. Ex. 19, T. p. 295:1–p. 300:17; 471:20-472:3; 491:5-493:16; 493:7-20; 925:10-18; 928:19-929:3; 953:8-12;1069:10-1070:14; 1073:16-20; 1088:20-1089:21)
30. I reject Finding of Fact 75 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
31. I reject Finding of Fact 76 because it is not supported by the substantial evidence of record, is erroneous, is contrary to the preponderance of the evidence offered in the contested case, and because such statements do not constitute adequate findings of the ultimate facts. *See, e.g., Welter v. Rowan County Bd. of Comm'rs*, 160 N.C. App. 358, 365, 585 S.E.2d 472, 478 (2003) ("None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts."); *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)).
32. I reject Finding of Fact 80 because it is not a Finding of Fact. It is simply a Statement of the Case. To the extent, it is determined to be a Finding of Fact, or to the extent that I am required to affirm the administrative law judge's denial of Petitioner's motion for a preliminary injunction, that denial is affirmed and Petitioner's motion is denied.
33. I reject Finding of Fact 82 because it is improperly identified as a Finding of Fact. It is simply a recitation of a portion of N.C. Gen. § 143-49 which, if recited, should be classified



as a conclusion of law.

The above-cited Findings of Fact engender the following:

### CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner is an aggrieved person under Chapter 150B and is entitled to commence a contested case.
3. Petitioner has satisfied all conditions precedent and all timeliness requirements for initiating this contested case.
4. This matter is ripe for a final decision.
5. The Department of Administration, including P&C, must not prejudice the substantial rights of Petitioner by making decisions which are in violation of constitutional provisions, in excess of its statutory authority or jurisdiction, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence in view of the entire record submitted, or arbitrary, capricious or an abuse of discretion. N.C. Gen. Stat. § 150B-51
6. In determining whether an agency decision is arbitrary and capricious, "the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." Jarrett v. N.C. Dep't of Cultural Resources, 101 N.C. App. 475, 479 (N.C. Ct. App. 1991) (*quoting* Lewis v. North Carolina Dep't of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989)).
7. The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," Burton v. City of Reidsville, 243 N.C. 405, 407, 90 S.E. 2d 700, 703 (1956), or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . ." Comm'r of Ins. v. Rate Bureau, 300 N.C. 381, 420 *pet. for reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980)
8. An agency decision can be reviewed, however, the reviewer may not replace the agency's judgment with its own when there are two reasonably conflicting views, even though the reviewer could have reached a different result upon a de novo review. Rector v. North Carolina Sheriffs' Educ. & Training Standards Com., 103 N.C. App. 527, 532 (N.C. Ct. App. 1991) *citing* Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).
9. P&C, as delegated by the Secretary of Administration, has the power and authority "to purchase or to contract for, by sealed, competitive or other suitable means all contractual services and needs of the State government . . ." [Emphasis Added] N. C. Gen. Stat. § 143-49.
10. All qualifying "contracts for the purchase of supplies, materials or equipment shall be based on competitive bids and acceptance made of the lowest and best bid(s) most advantageous to



the State as determined upon consideration of the following criteria: prices offered; the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record.” N. C. Gen. Stat. § 143-52.

11. N.C. Gen. Stat. §§ 143-19 and 143-52 grant P&C broad discretion to determine which matters other than price are to be considered in competitive procurements.
12. N.C. Gen. Stat. §§ 143- 19 and 143-52 grant P&C broad discretion to determine the method for conducting such competitive procurements.
13. In the instant matter, P&C appropriately determined, in the exercise of its discretion, that considering and scoring items other than price would obtain the lowest and best bid most advantageous to the State for office supplies.
14. In the instant matter, P&C appropriately determined, in the exercise of its discretion, that conducting a reverse auction would obtain the lowest and best bid most advantageous to the State for office supplies.
15. In the instant matter, P&C appropriately determined, in the exercise of its discretion, that awarding this Contract to a single vendor would obtain the lowest and best bid most advantageous to the State for office supplies. Inapposite to Petitioner’s claims, the Contract did not allow P&C to award portions of the Contract to multiple vendors when those potential awards were based on the Offline Pricing Tool. This tool was used by P&C only to verify the offeror’s single bid price, and none of the vendors were on notice that P&C would “cherry pick” their category prices.
16. The amount of money actually expended under the Contract cannot be determined solely by resorting to the projected purchasing patterns used in the Offline Pricing Tool. Moreover, if the Contract was apportioned to multiple vendors, additional costs would accrue to the user and thereby the State and taxpayers. Any allegations that additional savings would result from the apportioning of the Contract to multiple vendors are speculative and unproven.
17. As a result of this litigation, the Department of Administration was made aware of the fact that Accenture had other business relationships with several of the offerors, including Office Depot and the Corporate Express.
18. None of these business relationships were known previously to any of the P&C officials. P&C officials made all substantive decisions in the formation of the RFP and the creation of the Contract. P&C officials were the only persons to evaluate and score the offeror’s proposals.
19. There was no actual or apparent conflict of interest between P&C and Office Depot, Corporate Express or any of the other vendors.
20. Despite the business relationship between Accenture and Staples, Inc., Office Depot, and



Corporate Express, there is no evidence that any of these companies benefited from this relationship during the RFP process.

21. While it is always preferable to know of any potential conflicts of interest, the potential for a conflict of interest, without any other evidence, does not equate to an appearance of impropriety.
22. Moreover, in order to disqualify an individual or company, the conflict must be real and not speculative or generalized. *See* 1056 Am Jur 2d Municipal Corp., Counties, Other Political Subdivision § 126 (in the context of disqualifying an elected official from voting: the interest must be real and not speculative or generalized); Leiphart v. N.C. School of the Arts, 80 N.C. App. 339, 354 (in the context of overturning an employment discrimination decision under the State Personnel Act: mere appearance of impropriety, standing alone, is not sufficient grounds for disturbing decision); Ruffin Woody & Associates, Inc. v. Person County, 92 N.C. App. 129, 141 (1988) (in the context of disqualifying an arbitrator: Relying solely on a party's failure to disclose past transactions is insufficient. As experts in their fields, it is unrealistic to expect that they have absolutely no prior contacts with the parties. Although disclosure of such contacts is preferred, to permit a party to attack an award or depose the arbitrators whenever any prior transaction is not disclosed would frustrate the parties' intent to avoid litigation and obtain a swift resolution of their dispute.); State of North Carolina v. Frederick Camacho, 329 NC 589 (1991) (in the context of disqualifying an entire prosecutor's office: a mere appearance of impropriety will not support an order disqualifying an entire prosecutor's office)
23. The official record is devoid of any evidence that Accenture's relationships with Corporate Express, Office Depot, Staples, Inc., and possibly others had any impact whatsoever on the award of this Contract.
24. P&C's decision to award the Contract to Office Depot was not unconstitutional, was not in excess of its statutory authority or jurisdiction, was not made upon unlawful procedure, and was in no way arbitrary or capricious.
25. Nonetheless, bids submitted for a public contract should be rejected in cases where the solicitation was ambiguous. Where all bids were rejected because the specifications were confusing, it is proper for the public authority not to reconsider the rejected bids. 52 A.L.R.4th 186, 2a (2005).
26. As written and relied upon by all potential vendors, the RFP required that all office supplies purchased under the Contract be purchased through the E-Procurement system.
27. Purchases made without the use of E-Procurement, except in emergency situations, would violate the terms of RFP and Contract.
28. Retail purchases cannot be made through the E-Procurement system.
29. The RFP, and in particular Phase I of the RFP, afforded points to vendors who provided office supplies under the contract through retail sales.
30. In essence, any points given to a vendor for its ability to offer retail sales were points



awarded for actions that would violate the terms of the RFP and Contract.

31. The RFP should not have been crafted to award points for actions that would violate the terms of the RFP and Contract.
32. This resulted in an ambiguity that affected all vendors who received and submitted a response to the RFP.
33. Absent this ambiguity in the terms of the RFP, Petitioner's claim would be denied.
34. All vendors who bid on the Contract should be invited to, and are free to bid, on the next term contract for office supplies.
35. To the extent the recommended decision of the administrative law judge conflicts with the Findings of Fact and Conclusions of Law contained herein, those findings and conclusions are hereby rejected in total.

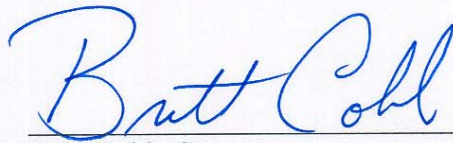
The above-cited Findings of Fact and Conclusions of Law compel the following:

### **DECISION**

Based upon the foregoing findings of fact and conclusions of law, the undersigned decides the following:

1. P&C is instructed to terminate the Contract pursuant to its terms which require at least 30 days written notice to Office Depot;
2. P&C is instructed to solicit bids, proposals or offers for a new Term Contract 615A in accordance with N.C. Gen. Stat. § 143-49 on or before October 1, 2006;
3. P&C is instructed to award a new Term Contract 615A to the vendor with the lowest and best bid(s) most advantageous to the State in accordance with N.C. Gen. Stat. § 143-52; and
4. P&C is instructed to take all steps necessary to have a new contract in place on or before December 1, 2006.

This the 18 day of August, 2006.

  
\_\_\_\_\_  
Britt Cobb, Secretary  
N.C. Department of Administration



**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a copy of the foregoing ***FINAL AGENCY DECISION*** was served upon the parties listed below by hand delivery and first class mail return receipt requested this the 1<sup>st</sup> day of August 2006:

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**N.C. Division of Purchase and Contract**

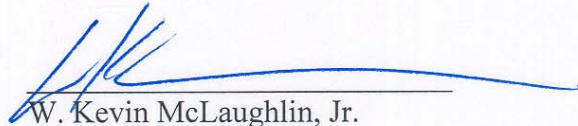
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**Office of Administrative Hearings**

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A handwritten signature in blue ink, appearing to read 'W. Kevin McLaughlin, Jr.', is written over a horizontal line.

W. Kevin McLaughlin, Jr.  
General Counsel  
N.C. Department of Administration